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Employment Discrimination—The Bottom Line Defense in Disparate Impact Cases

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EMPLOYMENT DISCRIMINATION—THE "BOTTOM LINE" DEFENSE IN DISPARATE IMPACT CASES. *Connecticut v. Teal*, 102 S. Ct. 2525 (1982).

Four black employees of the Connecticut Department of Income Maintenance were provisionally promoted to the position of Welfare Eligibility Supervisor. To attain permanent status as supervisors they had to participate in a selection process which required a passing score on a written examination. The results showed that 54.17% of all black candidates made a passing score on the written examination which was approximately 68% of the passing rate of the white candidates. The passing rate for whites was 79.54%. After failing the written examination, the four employees sued in federal district court, arguing that the use of the written examination was improper because it screened out blacks at a much higher rate than whites. The lawsuit was brought under Title VII of The Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[1] and named the State of Connecticut, two state agencies and two state officials as defendants.

After the lawsuit was instituted the defendants made promotions from the eligibility list generated by the written examination and applied an affirmative action program. The resulting promotion rate for black candidates was 22.9%, compared with a promotion rate of 13.5% for whites.

The defendants argued that this was a favorable "bottom line" since the result of the promotion process was that black candidates were not disproportionately denied the promotions, but in fact were promoted more frequently than white candidates. The defendants

1. 42 U.S.C. §§ 2000e-17 (1976 & Supp. IV 1980). Section 703(a) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2(a). Section 701 of Title VII sets out applicable definitions to the Act at 42 U.S.C. § 2000e (1976 & Supp. IV 1980).

claimed that this result was a complete defense to the plaintiffs' lawsuit over the written examination, the portion of the promotion process which had an adverse impact on black candidates. The district court held for the defendants. The Second Circuit Court of Appeals rejected the defendants' argument and held that if any portion of a selection process has an adverse impact on minority candidates under Title VII, a favorable bottom line result will not redeem the discriminatory portion. The United States Supreme Court affirmed.[2] The Court held that the favorable bottom line of a selection process will not prevent a plaintiff from making out a prima facie case of disparate impact under Title VII and will not serve as a defense when the plaintiff alleges a portion of the total selection process is discriminatory. *Connecticut v. Teal*, 102 S. Ct. 2525 (1982).

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, prohibits discrimination by employers, employment agencies and labor organizations on the basis of race, color, religion, sex or national origin.[3]

Title VII was the first major, comprehensive piece of federal legislation prohibiting discrimination in private employment.[4] The Act was amended in 1972 to prohibit discrimination by federal, state and local government employers.[5]

Title VII of the Civil Rights Act of 1964 prohibits both discriminatory treatment of statutorily protected individuals and the use of facially neutral employment practices that have an adverse impact

2. Justice Brennan wrote for the majority in the five-four decision.

3. *See* note 1 and accompanying text.

4. 42 U.S.C. §§ 2000e-17 (1976 & Supp. IV 1980).

The legislative history of Title VII suggests that one of the major concerns of Congress in the passage of the Civil Rights Act of 1964 was to remedy the denial of job opportunities to minority citizens. Connecticut v. Teal, 102 S. Ct. 2525, 2534 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971).

Several Senate and House Committee Reports were made concerning the Civil Rights Act of 1964 which indicate that Congress sought to end employment discrimination. The reports noted: "The basic purpose of H.R. 405 is to seek to eliminate arbitrary employment discrimination because of race, religion, color, national origin, or ancestry, through the utilization of formal and informal procedures." H.R. Rep. No. 570, 88th Cong., 1st Sess. 1 (1963); "The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial or religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business and trade associations." S. Rep. No. 872, 88th Cong., 2d Sess. 1 (1964); "The purpose of this bill is to secure to all persons of all races, colors, religions and nationalities the right to share equally and fairly in the opportunities for employment throughout the range of the national economy." S. Rep. No. 867, 88th Cong., 2d Sess. 1 (1964).

5. Equal Employment Opportunity Act of 1972, ch. 4, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972).

upon a protected group.[6] These two theories of recovery are known, respectively, as disparate treatment and disparate impact.

In disparate treatment, an individual is intentionally treated differently on the basis of race, color, religion, sex or national origin. For example, disparate treatment occurs when an employer hires only blacks to fill the most menial, lowest paying jobs, yet routinely hires whites who have no better qualifications for higher paying, more responsible positions. On the other hand, in a disparate impact case, it is a facially neutral practice that has an adverse impact on a member of a minority group. Such a practice, for example, may be a high school diploma requirement. In a given area of the country the minority population may have fewer high school graduates than the nonminority populace. A business practice of hiring only high school graduates would have an adverse impact on those minority applicants lacking diplomas. *Connecticut v. Teal* is a disparate impact case.

The Supreme Court distinguished the two theories in a series of decisions beginning in 1971. *Griggs v. Duke Power Co.* is a seminal case in Title VII litigation and deals with disparate impact.[7] In *Griggs* the employer required a high school diploma or satisfactory scores on two professionally prepared aptitude tests for an employee to be eligible to be hired or for interdepartmental transfer. These requirements disproportionately screened out blacks. Neither the high school education requirement nor the general intelligence test were shown to bear a relationship to successful job performance. The United States Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibited an employment practice which operates to exclude a protected group if the practice cannot be shown to be related to job performance.[8]

Shortly after *Griggs*, the Supreme Court, in *McDonnell Douglas Corp. v. Green*, addressed the theory of discriminatory treatment.[9] *McDonnell Douglas* involved an allegedly discriminatory refusal to hire a black because of his color and his involvement in civil rights activities. In *McDonnell Douglas* the Supreme Court enunciated the

6. 42 U.S.C. § 2000e-2(a) (1976 & Supp. IV 1980).

7. 401 U.S. 424 (1971). For a general discussion, *see* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 421 (1982).

8. The Court in *Griggs* noted that a business practice, such as job hiring or advancement, which has an adverse impact on a protected minority is prohibited by Title VII unless justified by "business necessity". *Griggs*, 401 U.S. at 431.

9. 411 U.S. 792 (1973).

proofs necessary for a prima facie case of disparate treatment.[10]

The next significant Supreme Court employment discrimination case dealt with disparate impact. In *Albemarle Paper Co. v. Moody*[11] the Court expanded on the requirements for recovery under the disparate impact theory, ruling that even if a defendant has justified a practice having an adverse impact on minorities, a plaintiff can still prevail if he can show that less discriminatory alternative practices were available to the employer.[12]

A later Supreme Court decision, *International Brotherhood of Teamsters v. United States*, noted that an employer need not have discriminatory intent to be liable under the disparate impact theory.[13] Under this decision the employer is deprived of a "good faith" defense in a disparate impact action.

The Equal Employment Opportunity Commission (EEOC) developed guidelines for use in determining whether a business practice has an adverse impact on a protected minority. The federal agency, which is charged with enforcement of Title VII, chose what is known as a "bottom line" approach. If the total number of minority members hired or promoted does not reflect discrimination, the EEOC will not normally take enforcement action even though one portion of the business' selection procedure does have an adverse impact on the protected group.[14] The Supreme Court ruled, in both *Griggs* and *Albemarle*, that the EEOC guidelines are entitled to "great deference," thus federal courts have allowed the bottom line defense even when the plaintiff is a private individual, rather than the EEOC.[15]

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10. *Id.* at 802. Other cases have contributed to an understanding of the burdens of proof for disparate treatment enumerated in *McDonnell Douglas Corp. See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

11. 422 U.S. 405 (1975).

12. *Id.* at 425. *See, e.g.*, Ramirez v. City of Omaha, 538 F. Supp. 7, 11-12 (D. Neb. 1981), *aff'd*, 678 F.2d 751 (8th Cir. 1982); I.M.A.G.E. v. Bailar, 518 F. Supp. 800, 803 (N.D. Cal. 1981).

But cf. Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980) (burden on employer to prove there is no alternative to the challenged practice); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1298 (8th Cir. 1975) (employer must show business necessity and no acceptable alternative).

13. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15. *See also Griggs*, 401 U.S. at 432.

14. 29 C.F.R. § 1607.4(C) (1978).

15. *Albemarle Paper Co.*, 422 U.S. at 430-31; *Griggs*, 401 U.S. at 433-34. *See, e.g.*, Ramirez v. City of Omaha, 538 F. Supp. 7, 12 (D. Neb. 1981), *aff'd*, 678 F.2d 751 (8th Cir.

Basing its decision on *Griggs v. Duke Power Co.* and its progeny, the Supreme Court characterized *Connecticut v. Teal* as a disparate impact case, and held that the burdens of proof for disparate impact applied. Under the *Griggs* rationale the plaintiff first had to show that a facially neutral employment practice, such as one used in hiring or promotion, had a significant detrimental effect on a minority.[16] Once the plaintiff's prima facie case was established, the employer must then prove that the questioned practice was justified.[17] If the employer has met this burden and successfully raised this defense, a plaintiff may still prevail if he can show that the practice was merely a "pretext" to discriminate.[18]

The majority in *Teal* ruled that the defendants' written examination used in their promotion process had a significant detrimental effect on blacks by screening them out at a disproportionate rate.[19] The Court therefore concluded that the examination violated the civil rights of the plaintiffs under section 703(a)(2) of Title VII.[20]

In considering the disparate impact theory of Title VII, the majority found that the focus had never been the total number of minority members hired or promoted, but whether the challenged practice was a discriminatory bar to individual employment opportunity.[21] The Court found that the bottom line defense could serve to deprive an individual of employment opportunity even when the minority group is treated favorably.

The United States as amicus curiae argued that section 703(h) of Title VII[22] protected the written examination at issue from attack because the examination was not "used to discriminate" and the total process did not disproportionately deprive blacks of promotions.[23] The Supreme Court disagreed, finding that section 703(h)

1982); I.M.A.G.E. v. Bailar, 518 F. Supp. 800, 804 (N.D. Cal. 1981), United States v. County of Fairfax, 25 Fair Empl. Prac. Cas. (BNA) 662, 667 (E.D. Va. 1981).

16. 102 S. Ct. at 2531.

17. *Id.*

18. *Id. See Albemarle Paper Co.*, 422 U.S. at 425; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

19. 102 S. Ct. at 2531.

20. *Id.* at 2531-32.

21. *Id.* at 2532.

22. Section 703(h) of Title VII states:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

23. 102 S. Ct. at 2533.

was only intended to protect the use of job-related tests and was not meant to serve as a defense to discriminatory practices.[24] The Court also rejected defendants' argument that a favorable bottom line should serve as an affirmative defense.[25] The majority characterized these arguments as "nothing more than a request that we redefine the protections guaranteed by Title VII."[26]

The dissenters[27] argued that the majority decision was inconsistent with the nature of disparate impact[28] because, while disparate treatment focuses on the individual, disparate impact focuses on the group.[29] The dissenters pointed out that since 22.9% of the blacks who entered the promotion process were actually promoted, compared with 13.5% of the whites who entered the same process,[30] to hold that such a selection process had a disparate impact was to ignore reality.[31] Accordingly, "[t]here can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a group."[32] It was also argued that the majority confused the aim of Title VII—the protection of individuals—with the methods of proof by which Title VII rights may be vindicated.[33] In so doing, the majority misconstrued the uniformly recognized distinction between disparate impact and disparate treatment.[34] Additionally, the cases cited by the majority to support their position did not do so, according to the dissenters.[35] For instance, the majority cited *Dothard v. Rawlinson*[36] for the proposition that the bottom line is not the determining factor in a disparate impact case.[37] The dissenters, however, argued that the *Dothard* court did refer to the bottom line when the Court discussed whether discriminatory height and weight requirements had an adverse effect on the hiring decision.[38]

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24. *Id.*

25. *Id.* at 2534.

26. *Id.*

27. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor.

28. *Id.* at 2536.

29. *Id.*

30. *Id.* at 2537.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 2538.

36. 433 U.S. 321 (1977) (holding that the minimum height and weight requirements used by the Alabama Board of Corrections had a discriminatory impact on women).

37. 102 S. Ct. at 2532-33.

38. *Id.* at 2538.

Other cases cited by the majority were also considered inappropriate because they involved facially discriminatory policies, while *Teal* involved a facially neutral policy.[39] "Today's decision takes a long and unhappy step in the direction of confusion,"[40] the dissenters concluded.

Connecticut v. Teal is one of the most significant cases on disparate impact under Title VII in recent years. The case rejected a position which was previously accepted by the lower courts. It had been held that a favorable bottom line would protect an employer from liability for a discriminatory component of a selection process. *Teal* made the bottom line defense no longer available against an individual who brings suit.[41] *Teal* did not, however, invalidate the EEOC guidelines which normally prevent the government from taking action if the bottom line of the practice or procedure is favorable.[42] The guidelines in effect at the time of *Teal* have not been repealed or modified since the date of the decision.

After *Teal*, an employer must be prepared to prove the necessity of any business selection practice having a disparate impact on an individual minority member. This may be proven by a job validation study approved by the EEOC guidelines,[43] which can be expensive,[44] or the employer can show that the discriminatory portion of the selection procedure is essential to his business operation.[45] The bottom line of the *Teal* decision for the employer is that he must take a close look at any component of his selection process having an adverse impact. For the individual minority member, the Court's holding in *Teal* further clarifies his rights to equal employment opportunity under Title VII.

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39. *Id.* at 2539. The dissenters argued that the majority also misapplied the opinions in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) in their present analysis of those cases. 102 S. Ct. at 2538-39 n.6.

40. *Id.* at 2539.

41. *Id.* at 2529. The Eighth Circuit recently held in Ramirez v. City of Omaha, 678 F.2d 751 (8th Cir. 1982), that the plaintiff failed to make out a prima facie case of disparate impact because "the hiring process taken as a whole did not discriminate . . . ." *Id.* at 753. This case was decided one month before *Teal* and to the extent that *Ramirez* relied on the bottom line as a defense it would be overruled by *Teal*.

42. 29 C.F.R. § 1607.4(C) (1978).

43. 29 C.F.R. § 1607.5-.14 (1982).

44. 102 S. Ct. at 2539.

45. *See supra* notes 7-8 and accompanying text.